Ilham Syarif v Public Prosecutor

COURT OF APPEAL (BRUNEI DARUSSALAM) — CRIMINAL APPEAL NO 3 OF 2009
POWER PCA, MORTIMER AND DAVIES JJCA
30 APRIL 2009

Criminal Procedure — Appeal — Conviction, against — Appellant pleading guilty to multiple charges — Nature of charges, seriousness and maximum sentences for those charges understood by appellant — Appellant having ample opportunity to change plea of guilty — Admitted facts evincing appellant's guilt — No grounds for appeal against conviction put forward — Whether appeal against conviction ought to be dismissed

Criminal Procedure — Sentence — Aggravating circumstances — Sanctity of home invaded — Prevalence of offence — Entering country specifically to commit offence — Whether deterrent sentence warranted

Criminal Procedure — Sentence — Appeal against sentence — 15 years imprisonment and 12 strokes of cane for gang robbery, attempted housebreaking and housebreaking — Whether sentence excessive

The appellant pleaded guilty to the following charges: (i) one charge of gang robbery contrary to s 395 of the Penal Code ('Code')('the gang robbery offence'); (ii) one charge of attempted housebreaking at night in order to commit theft contrary to s 511 read with ss 457 and 34 of the Code ('the attempted housebreaking offence'); and (iii) one charge of housebreaking at night in order to commit theft contrary to s 457 read with s 37 of the Code ('the housebreaking offence'). The appellant had been charged with two others who had also pleaded guilty. All the offences were committed in one night. The appellant was sentenced as follows: (a) nine years imprisonment with 12 strokes for the gang robbery offence; (b) three years imprisonment with three strokes for the attempted housebreaking offence; and (c) three years imprisonment with three strokes for the housebreaking offence. The sentences were ordered to run consecutively but the strokes were made non-cumulative. The result was a sentence of 15 years imprisonment with 12 strokes. The appellant appealed against both conviction and sentence.

Held, dismissing the appeal against conviction but allowing the appeal against sentence:

(1) Before he pleaded guilty, the appellant had understood the nature of the

charges against him, their seriousness and the maximum sentences that he might be obliged to serve in respect of them. He did not seek to change his plea over the two days before he was sentenced. He did not put forward any basis as to why he should be permitted to change his plea. Further, it was plain on the admitted facts that he was guilty of the offences charged. Thus, the appellant should not be permitted to appeal against his conviction (see paras 7–8).

(2) Where the sanctity of a private home is invaded for the purpose of committing an offence, deterrence is an important consideration. This is especially so in Brunei due to the prevalence of such offences. In the instant case, an additional deterrent factor was that the appellant and his co-offenders had entered Brunei specifically for the purpose of committing such offences (see para 11).

(3) In the instant case, a sentence of no higher than nine years imprisonment ought to have been the starting point before the consideration of mitigating factors for the gang robbery offence. Even after adding the aggravating factors, a starting point of more than ten years imprisonment could not be justified. After a mitigation of one third for the prompt guilty plea, the appropriate sentence would be seven years imprisonment and 12 strokes (see para 17).

(4) The starting point of four years and four strokes for each of the attempted housebreaking and housebreaking offences was not excessive. However each sentence should have been reduced by one third for the prompt plea of guilty, leaving two years and eight months imprisonment for each offence. Since the offences were of a similar kind and were all committed on the same night, the sentences for the attempted housebreaking and housebreaking offences should have been made concurrent with the sentence for the gang robbery offence (see paras 17–18).

[Bahasa Malaysia summary

Perayu merayu bersalah terhadap tuduhan-tuduhan berikut: (i) tuduhan merompak secara berkumpulan bertentangan dengan s 395 Kanun Hukuman Jenayah ('Kanun') ('kesalahan merompak secara berkumpulan'); (ii) tuduhan percubaan pecah rumah pada waktu malam untuk mencuri bertentangan dengan s 511 dibaca bersama ss 457 dan 34 Kanun ('kesalahan percubaan pecah rumah'); and (iii) tuduhan pecah rumah pada waktu malam untuk mencuri bertentangan s 457 dibaca bersama s 37 Kanun ('kesalahan pecah rumah'). Perayu telah dituduh bersama dengan dua yang lain yang juga mengaku bersalah. Kesemua kesalahan dilakukan pada malam yang sama. Perayu dihukum seperti berikut: (a) penjara sembilan tahun dengan 12 sebatan untuk kesalahan merompak secara berkumpulan; (b) penjara tiga tahun dengan tiga sebatan untuk kesalahan percubaan pecah rumah; dan (c)

penjara tiga tahun dengan tiga sebatan untuk kesalahan pecah rumah. Hukuman-hukuman tersebut diperintahkan dijalankan serentak tetapi sebatan-sebatan tersebut dibuat tidak kumulatif. Keputusannya adalah hukuman penjara 15 tahun dengan 12 sebatan. Perayu merayu terhadap kedua-dua sabitan dan hukuman tersebut.

Diputuskan, menolak rayuan terhadap sabitan tetapi membenarkan rayuan terhadap hukuman:

(1) Sebelum mengaku bersalah, perayu memahami sifat tuduhan-tuduhan terhadapnya, keseriusannya dan hukuman maksima yang dia kena jalani berkaitannya. Dia tidak memohon untuk menukar plinya dalam masa dua hari sebelum dia dihukum. Dia tidak memberikan apa-apa alasan mengapa dia patut dibenarkan untuk menukar plinya. Selanjutnya, ia adalah jelas atas fakta yang diberikan bahawa dia bersalah terhadap kesalahan-kesalahan yang dituduh tersebut. Oleh itu, perayu tidak boleh dibenarkan untuk merayu terhadap sabitannya (lihat perenggan 7–8).

(2) Di mana kesucian rumah persendirian dicerobohi untuk tujuan melakukan kesalahan, pencegahan adalah pertimbangan yang penting. Ini terutamanya di Brunei akibat daripada tersebar luasnya kesalahan-kesalahan sebegitu. Dalam kes ini, faktor pencegahan tambahan adalah bahawa perayu dan pesalah-pesalah bersama telah memasuki Brunei secara khususnya bertujuan melakukan kesalahan-kesalahan tersebut (lihat perenggan 11).

(3) Dalam kes ini, hukuman tidak lebih daripada penjara sembilan tahun patut menjadi poin permulaan sebelum pertimbangan faktor peringanan untuk kesalahan merompak secara berkumpulan. Walaupun selepas menambahkan faktor keterlaluan, poin permulaan lebih daripada penjara 10 tahun tidak boleh dijustifikasikan. Selepas peringanan satu pertiga untuk pengakuan bersalah yang cepat, hukuman yang wajar adalah penjara tujuh tahun dan 12 sebatan (lihat perenggan 17).

(4) Poin permulaan empat tahun dan empat sebatan untuk setiap percubaan pecah rumah dan kesalahan pecah rumah tidak berlebihan. Walau bagaimanapun setiap hukuman patut dikurangkan sebanyak satu pertiga untuk pengakuan bersalah yang cepat, menjadikan penjara dua tahun lapan bulan untuk setiap kesalahan. Memandangkan kesalahan-kesalahan adalah jenis sama dan kesemuanya dilakukan pada malam yang sama, hukuman-hukuman untuk percubaan pecah rumah dan kesalahan pecah rumah patut dibuat serentak dengan hukuman untuk kesalahan merompak secara berkumpulan (lihat perenggan 17–18).]

Notes

For cases on aggravating circumstances, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3325–3327.

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

For cases on conviction against appeal, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 296–341.

Cases referred to

Alihan bin Durahim v PP [2000] JCBD 144 (refd)

Md Julaini bin Hj Hidup v PP [1997] 2 JCBD 240, CA (refd)

Mohammad Joll bin Tumih v PP (Criminal Appeal No 5 of 2005) (refd)

Nuruddin bin Ahmid v PP (Criminal Appeal No 14 of 2008) (refd)

Zaini bin Hj Dagang v PP [1997] 2 JCBR 248, CA (refd)

Legislation referred to

Penal Code (Cap 22) [BR] ss 34, 37, 392, 395, 457

Appelant in person.

Christopher Ng (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Davies JCA:

[1] The appellant pleaded guilty on 23 September 2008 to one charge of gang robbery contrary to s 395 of the Penal Code; one charge of attempting to commit housebreaking at night in order to commit theft contrary to s 511 of the Penal Code read with ss 457 and 34 thereof; and one charge of committing housebreaking at night in order to commit theft contrary to s 457 read with s 37 of the Code. All of these offences were committed in the early hours of 5 September 2008. In respect of all of them the appellant was charged jointly with two other offenders each of whom also pleaded guilty on 23 September 2008.

[2] The maximum penalty for gang robbery is 30 years imprisonment with a minimum of 12 strokes; the maximum penalty for housebreaking at night in order to commit theft is 15 years imprisonment. For the offence of gang robbery the appellant was sentenced to nine years imprisonment with 12 strokes; for the offence of attempted housebreaking at night with intent to commit theft he was sentenced to three years imprisonment with three strokes; and for the offence of housebreaking at night with intent to commit theft he was sentenced to three years imprisonment with three strokes. The

sentences were ordered to run consecutively but the strokes were made non-cumulative. The result was a sentence of 15 years imprisonment with 12 strokes.

[3] Notwithstanding his plea of guilty, the appellant seeks to appeal against his conviction. He also appeals against his sentence.

[4] The statement of facts admitted by the appellant was as follows:

(a) All three defendants are Indonesian nationals and at the time of the offence were unemployed.

(b) All three defendants together with one more individual still at large were friends who knew each other from Entikong, Pontianak, in Indonesia. They knew each other from taking drugs together and had known each other for about two months.

(c) All three defendants together with one more individual still at large left Entikong in Pontianak by bus where they reached Miri, Sarawak. From there, they took a flight to Limbang and it was from there that they crossed over the border over to Brunei Darussalam on 3 September 2008 through the Kuala Lurah Immigration Post at about 2pm.

(d) All three defendants together with the suspect still at large then took a bus (No '48') to Bandar Seri Begawan which took them to the main bus terminal at the multi storey car park building. Upon stopping at their destination, D1 gave instructions to D2 and D3 to wait for him and the suspect still at large ('D4') while they took another bus (No '34'). The reason for going on this bus ride was to survey for houses to rob in Brunei. Upon arriving at the Berakas area where they saw a lot of big houses, D1 asked the bus driver whether there were any other buses that travelled to the area. He was told that Bus No '24' also travelled to this area. D1 and D4 then made their way back to BSB and reached there at about 5pm.

(e) Upon reaching BSB, D1 and D4 reunited with D2 and D3 and proceeded to search for a place to stay. They managed to book two rooms at KH Soon Rest House, Jalan Pemancha, Bandar Seri Begawan near the multi storey car park building and stayed the night there.

(f) At 9am, on 4 September 2008, D1 and D4 once again boarded Bus No 34 and travelled along the same route in order to narrow down the houses they wanted to rob. At about 5pm, D1 and D4 met up with D2 and D3 who had been tasked to buy a screwdriver, a metal cutter and face masks which would be tools used for the commission of their crime.

(g) All four of them boarded Bus No '24' to Berakas which was the area of their intended robberies. When they got off, they proceeded to seek shelter in an empty abandoned house close to the traffic lights of the Berakas-Madang intersection where they stayed till they were ready to begin their spree.

(h) At about 1am, on 5 September 2008, they proceeded to their first target at the Kampong Terunjing area. All four of them walked on foot through the area still covered by forest whereby they arrived at the area in Terunjing where they saw some big houses during their bus route the previous morning.

(i) Upon reaching the first house at the vicinity, D4 used a cutter to cut the wiring of the fence in order to obtain entry into the house compound. However, their attempts to rob their first house were halted when they saw a couple outside the first house. Upon seeing this, they decided against robbing that house and proceeded to the neighbouring house.

(j) The next target was House No 42, Simpang 52, Jalan Terunjing Lama, Berakas, a house belonging to one Hj Ibrahim bin Hj CA Mohammad. In order to gain entry, D4 proceeded to cut the wiring of the fence. Once they got into the house compound, the four of them surveyed the surroundings. D1 then proceeded to pry open the lock of the glass sliding door with the screwdriver whilst the others acted as look out. Once this was done, they proceeded into the house.

(k) The door the three of them entered from led into the room of one Garry Ramlee Hj Ibrahim, the owner's son. He was sleeping when he noticed the sliding door had opened. Upon seeing them, he jolted up whereby he was restrained by D1 and D4. He attempted to scream for help but was punched in the face by D1. D1 then took A1's mobile phone, one Nokia E71 mobile phone to prevent him from calling anyone.

(l) They then engaged in conversation with him, asking him how many people were in the house. The victim was then tied up with a piece of nylon string and gagged in the mouth with a piece of cloth. The victim then fought back with the robbers but was unfortunately overpowered. Afraid that the victim's scream had awoken the house, all four of them left the scene in a hurry. A1's screams were only heard by his father at about 2.04am whereby they immediately reported the matter to the police.

(m) The victim's injuries are categorised as 'hurt'.

(n) Following their failed attempt at robbing the previous house, all four robbers fled and proceeded back to the main road near the traffic light.

From there, they walked all the way towards the Madang area. On the way, D1 took out A1's SIM card and threw it away. They then looked for another house to rob.

(o) They then arrived at a residential area in Madang whereby they proceeded to pinpoint another house to rob. D1 then proceeded to cut the fence again to gain entry into the house compound whilst the others kept look out. As they were entering the house compound, D1 then saw a dog in front of this particular house. They then changed their minds to rob this house and proceeded to the neighbouring house.

(p) All four of them then climbed over the metal gate of House No 19, Simpang 68, Jalan Madang, Berakas, a house belonging to one Pg Md Azamuddin bin Pg Hj Mohiddin. Upon entering the house compound, all four of them proceeded to the back of the house whereby D1 then proceeded to pry open one of the windows of the room in the ground floor. This window was the window to the maid's room.

(q) The maid, one Siti Mariana bt Salam was preparing food in the kitchen when she heard a noise coming from her room. When she entered her room, she saw that her window was open and saw two men with hooded masks on and another without. She then screamed in shock. This led to the robbers panicking and fleeing the scene once again.

(r) The maid then informed her employer of the incident who proceeded to report the matter to the police at about 3.45am.

(s) The four of them then fled back to the main road where they proceeded to enter the compound of another house, No 22, Simpang 46–30–32, Perumahan EXPO, Kampong Madang, Berakas. This was a house belonging to one Hj Kamis bin Hj Hamidon. All four of them then proceeded to the back of the house whereby D1 proceeded to use a screwdriver to pry open the lock of one of the windows. Once he was able to do so, he entered the house through the window and unlocked the door for his co-accused to get in. This was about 4am in the morning.

(t) Once inside the house, the robbers then opened all the doors of the rooms in the ground floor and rummaged around for things to steal. They found nobody around and nothing to steal. They then proceeded up the stairs whereby they opened the door of one of the rooms in which they saw the owner and his wife sleeping on their bed. D1 then entered the room and took out the owner's wife handbag which was placed at the side of the bed, without the owners noticing.

(u) Once they had obtained the handbag, they proceeded to rummage through the handbag and stole:

(i) BND$5,000;

(ii) one Motorola V3i mobile phone;

(iii) one Alcatel mobile phone; and

(iv) three rings.

(v) They then left the emptied bag at the stairs.

(w) The noise the robbers were making woke up one of the owner's daughters who opened the door, thinking that her parents were up for 'sahur'. When she opened the door, she came face to face with one of the robbers who was hooded at that time. She then screamed and locked herself in her room. The robbers once again fled the scene immediately.

(x) All four of them proceeded out and into the drains whereby they used it to hide and make their way to the roundabout to escape detection. It was there that they disposed of their tools such as the metal cutter and the screwdriver.

(y) The robbers then took a bus back to Bandar Seri Begawan where they went back to their rooms in the rest house to rest. The money was divided between the four of them whereas D4 took the rings.

(z) Based on information received by the Royal Brunei Police Force, D2 and D3 were arrested on 6 September 2008 at about 12.15am by a team from the Serious Crime Unit at Room 407 of the rest house where they were staying. D1 was arrested at about 12.45am whilst he was walking towards the Kuala Lurah Immigration Post.

(aa) Upon arrest, one Motorola mobile phone was recovered in the possession of D2 whereas one Nokia E71 mobile phone was found in D1's possession.

(ab) Only BND$2,595 of the stolen monies have been recovered from the defendant's possession.

(ac) All three defendants possess no previous convictions in Brunei Darussalam.

[5] From these facts the learned sentencing judge reasonably inferred that the appellant and his co-offenders entered Brunei for the purpose of committing offences such as those described in the statement.

THE APPEAL AGAINST CONVICTION

[6] On 23 September 2008 the charges were read to the appellant in Indonesian, his native language. The learned judge informed the appellant of

the seriousness of the charges against him, informed him of the penalties in each case and gave him time to ask for an adjournment and to seek legal advice. Notwithstanding this, the appellant indicated that he was ready to plead, said that he understood the charges and the penalty for each and pleaded guilty. The facts set out above were then read to him in Indonesian. He then admitted their truth. The hearing was then adjourned until 25 September when the appellant was sentenced.

[7] It is plain from the above facts that, before he pleaded guilty, the appellant understood the nature of the charges against him, their seriousness and the maximum sentence which he might be obliged to serve in respect of them. It was only after this that he pleaded guilty. Moreover he did not seek to change his plea over the ensuing two days before he was sentenced.

[8] No basis was put before this court as to why the appellant should now be permitted to change his plea. Moreover it is plain on the facts which he admitted that he was guilty of the offences charged. We did not think that he should now be permitted to appeal against his conviction. Accordingly we dismiss that appeal.

THE APPEAL AGAINST SENTENCE

[9] The central question is whether an overall sentence of 15 years with 12 strokes is excessive for the total criminality of the appellant on the night of 5 September 2008 having regard to his prompt plea of guilty.

[10] The starting point adopted by the learned sentencing judge for the sentence for gang robbery was one of 12 years with 12 strokes. That was then reduced to nine years and 12 strokes for the appellant's prompt plea of guilty and the absence of any prior convictions in Brunei. In respect of each of the other offences the starting point adopted was a sentence of four years and four strokes and then each was reduced to three years and three strokes for the above mitigating factors.

[11] In offences of this kind, that is, where the sanctity of a private home is invaded for the purpose of committing an offence, deterrence is an important consideration. This is especially so in Brunei because of the prevalence of offences of this kind. An important additional deterrent factor in the present case is that the appellant and his co-offenders entered Brunei specifically for the purpose of committing offences of this kind. It is with these aggravating factors in mind that we turn to the sentences imposed.

[12] In considering the offence of gang robbery the learned primary judge pointed to sentences for this offence ranging from 18 months to 25 years.

However, in our opinion there is no decision of this court which justifies a starting point of 12 years for the offence of gang robbery described here. Nor do they justify a reduction of as little as one quarter of the sentence for a prompt plea of guilty.

[13] In *Zaini bin Hj Dagang v Public Prosecutor* [1997] 2 JCBR 248 the appellant was convicted of robbery pursuant to s 392 of the Penal Code. The sentence imposed on him was one of five years imprisonment. In dismissing the appeal this court said:

> In passing sentence, the judge mentioned the appellant's record and commented that he had subjected the victim, who was still a stranger to the country, to a terrifying experience. The judge could find no mitigating circumstances and noted that for an offence under s 392 of the Penal Code the minimum number of strokes which could be awarded was 12.
>
> In the light of the seriousness of the offence, the fear to which he subjected the victim and his bad record (including a conviction for the very offence that he committed in this case), we are unable to say that the sentence, either in respect of the imprisonment or the number of strokes awarded, could be regarded as in any way excessive.

[14] In *Md Julaini bin Hj Hidup v Public Prosecutor* [1997] 2 JCBD 240 the appellant was convicted of robbery although, it seems, he could have been convicted of robbery using a deaD1y weapon. The relevant facts are described as follows in the judgment of this court:

> The facts were that at 10 o'clock at night the appellant went to hotel staff quarters where three girls were quartered. He rang the bell and one of them went to open the door. There she saw a man with the bottom of his face covered with a towel, who was pointing a knife at her and who forced his way into this fourth floor flat. The girl ran into a bedroom where the two other girls were and locked the door. One of them then summoned help with the aid of a mobile telephone. When help came, a search of the premises was made and the appellant was found on the first floor. He was dressed in the same manner as the woman had described, and property stolen from the flat was found on his person. He was also found to be carrying a knife, which the girl identified as similar to the one that had been held towards her.

[15] The principal question before this court was whether the primary judge had been correct in sentencing the appellant as if he had been convicted of robbery when armed with a deaD1y weapon. Notwithstanding that this court held that that approach was erroneous, it concluded that a sentence of nine years imprisonment for this offence was not manifestly excessive.

[16] In *Alihan bin Durahim v Public Prosecutor* [2000] JCBD 144 two men had been convicted, after a trial, of gang robbery contrary to s 395 of the Penal Code. One had been sentenced to seven years imprisonment and 12 strokes, the other to five years imprisonment and 12 strokes, the 12 strokes in each case being mandatory. Those sentences were upheld by this court.

[17] These sentences show, in our opinion, that a sentence of no higher than nine years imprisonment should have been the starting point in the present case, before consideration of mitigating factors, for the offence of gang robbery. See also *Nuruddin bin Ahmid v Public Prosecutor* (Criminal Appeal No 14 of 2008). Even when one adds the aggravating factors referred to earlier, a starting point of more than ten years imprisonment cannot, in our view, be justified. It would then be appropriate to mitigate that by one third of that sentence for the prompt plea of guilty. This would then result in a sentence of seven years imprisonment and 12 strokes.

[18] The starting point for each of the other sentences imposed by the learned sentencing judge, four years and four strokes, was in our opinion not excessive. However each should have been reduced by one third for the prompt plea of guilty. That would have left sentences of two years and eight months imprisonment in each case.

[19] In *Mohammad Joll bin Tumih v Public Prosecutor* (Criminal Appeal No 5 of 2005) this court considered the appropriate approach to be taken in sentencing for multiple offences in order to reach the appropriate total sentence for the overall criminality involved. In this case, because the offences were of a similar kind and were all committed on the same night pursuant to the same enterprise, we think that the second and third sentences should have been made concurrent with the first.

ORDERS

[20] Dismiss the appeal against conviction.

[21] Allow the appeal against sentence.

[22] Set aside the sentence imposed for gang robbery.

[23] In lieu, impose a sentence of seven years imprisonment and 12 strokes for that offence.

[24] Set aside the sentences imposed for attempting to commit housebreaking at night in order to commit theft and for housebreaking at night in order to commit theft.

[25] In lieu, in each case impose a sentence of two years and eight months imprisonment and three strokes.

[26] Order that the sentences and the strokes imposed in para [25] be concurrent with the sentence and strokes imposed in para [23].

Appeal against sentence allowed and appeal against conviction dismissed.

Reported by Andrew Christopher Simon